

EXHIBIT I

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. DAVID BENJAMIN COHEN
*Justice*PART 58

FITZGERALD EDIBLES, INC. D/B/A P.J.CARNEYS,INDEX NO. 150625/2012

Plaintiff,

MOTION DATE 1/12/2017

- v -

MOTION SEQ. NO. 003OSBORNE TENANTS CORP., JOSEPH FERRARA, YUNGA
CONSTRUCTION INC.**JUDGMENT**

Defendant.

The following e-filed documents, listed by NYSCEF document number 80, 81, 82, 83, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120were read on this application to/for Set Aside Verdict.

Defendant Osborne Tenants Corp. (“Osborne”) is the owner of a building located at 906 Seventh Avenue, New York, New York 10019 (the “building”). The ground floor of the building, consisting of commercial stores on both 57th Street and Seventh Avenue, and the basement, is net leased to 57th and 7th Associates, Inc. (“57”) which is controlled and managed by Jack Resnick & Sons, Inc. (“Resnick”). Defendant Joseph Ferrara (“Ferrara”) was a shareholder of Osborne and served as president of the board of directors.

Since 1981, plaintiff subleased stores numbered 18, 19, 20 and 21, from Resnick, in which it operates a bar and restaurant. Resnick did not sublease any space in the basement to plaintiff. The area at issue in this case is a common vestibule in the basement space. The master lease between Osborne and Resnick provides Osborne with the right of access to the garbage

room through the common vestibule and provides Resnick with access to certain storage space in the basement through the common vestibule. Plaintiff did not lease any space in the basement from Resnick. Plaintiff and Osborne use the common vestibule as a pass through between the alley behind the building and other areas of the basement. Within the common vestibule there are three distinct “niche” areas totaling 97 square feet in space. At some point in time, plaintiff began keeping some of its equipment, including an ice maker, compressors and refrigeration units, in these niches. Defendants contend that plaintiff moved this equipment into the area around September 2011 when it was required to move this equipment out of the adjoining garbage room. As per the testimony of plaintiff’s principal, Mr. Fitzgerald, the ice machine and compressors were moved from the garbage room to the common vestibule niches about two weeks apart. Defendants further contend that prior to this time, the common vestibule niches did not contain any equipment belonging to Osborne, Resnick or plaintiff. Plaintiff offered testimony at trial that it had been using these niches for equipment for at least 30 years prior to January 2012, that Resnick allowed it to use the common vestibule since 1976, its use of the common vestibule had been open and notorious and without any complaint from the Osborne prior to 2011, and that its predecessor in interest, 906 Tavern Corp., had also previously been using the common vestibule incident to its lease to operate a bar. It should be noted that Ferrara testified that, to his knowledge, plaintiff had been using the common vestibule niches for at least thirty years prior to 2011 with consent from Osborne, until plaintiff exceeded that consent in September 2011, presumably by moving addition equipment into these spaces.

At trial, evidence was presented that on December 16, 2011, Osborne sent plaintiff a letter seeking that they remove all of their equipment from the common vestibule in order to relocate the waste line under the floor. The letter represented that with respect to the common

vestibule, the scope of work was going to be the relocation of a waste pipe in the floor, removing the plywood wall, and whitewashing the walls. Plaintiff contends that this scope of work did not require removal of its equipment from the common vestibule and it did not remove its equipment. Defendants chose to do the work the week of January 3, 2012 for the convenience of the plaintiff since plaintiff would be closed for its annual renovations. Yunga Construction Inc. (“Yunga”) was the general contractor retained by Osborne to perform the work in the basement, including in the common vestibule. At the time, plaintiff contended that it had ice machines, refrigerators, freezers, compressors and other equipment located in the niches of the common vestibule. Prior to starting the work, Ferrara directed its contractors to remove all of plaintiff’s equipment located in the vestibule; and the equipment was removed on or about January 4, 2012. During the course of the renovation, the Osborne decided to lower the floor of the entire common vestibule to improve overhead clearance in the room. After the equipment was moved, Yunga began excavating the entire floor of the vestibule and this work continued through Friday January 6, 2012. Ferrara then authorized Yunga to perform the additional work of fabricating and installing locking metal cage doors enclosing the niches in the vestibule, thereby preventing plaintiff from returning its equipment to the niches. Plaintiff became aware of the removal of its equipment on or about January 9, 2012. Plaintiff was never restored to use of the niches that were locked behind the metal cage doors and the area has remained free of equipment. Plaintiff has never claimed that it was excluded from possession from any portion of the ground floor bar and restaurant which is continued to operate profitably through the date of trial.

Plaintiff claimed that, as a result of the destruction of the equipment, including refrigerators, ice machines, compressors and other equipment, its business was harmed as its reopening was delayed by two weeks. Mr. Fitzgerald’s testimony as to the duration of the

closure was impeached at trial using his deposition testimony that the closure was only five days beyond when he expected to reopen. Plaintiff also claimed that it incurred higher costs to maintain and replace equipment with more expensive equipment, and the amount of food served and stored has been diminished, increasing plaintiff's costs.

At trial, the jury returned a verdict in favor of plaintiff finding both defendants liable for wrongful eviction, trespass to chattel and conversion. The jury found defendants not liable for trespass to land and not liable in fraud, finding that Osborne did not make a false representation to plaintiff and that Ferrara did not make a representation to plaintiff. The jury awarded to plaintiff \$37,000 in compensatory damages for property damage and loss, and \$17,000 for loss of business profits -- significantly less than plaintiff had sought. The jury awarded punitive damages against Osborne in the amounts of \$20,000 on the claim for wrongful eviction and \$37,000 on the claim for conversion, and awarded punitive damages against Ferrara in the amounts of \$138,355.94 on the claim for wrongful eviction and \$23,288.12 on the claim for conversion.

Treble Damages

Plaintiff seeks the imposition of treble damages on the compensatory award. The jury returned a verdict in favor of the plaintiff on the cause of action for wrongful eviction. "If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrongdoer." (RPAPL 853). An award of treble damages pursuant to RPAPL 853 is discretionary (*see Moran v. Orth*, 36 AD3d 771, 772 [1st Dept 2007]; *Lyke v. Anderson*, 147

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